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April 1, 1998

VIA HAND DELIVERY

Mr. David Waddell
Executive Secretary
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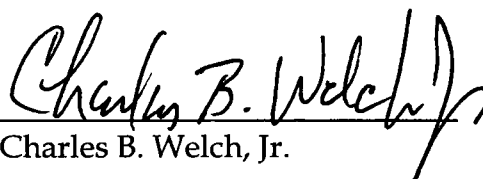
RE: Application of Electric Power Board of Chattanooga
for a Certificate of Public Convenience and Necessity
to Provide Intrastate Telecommunications Services
TRA Docket No. 97-07488

Dear Mr. Waddell:

Please find enclosed the original and thirteen copies of the Reply Brief on behalf of the Tennessee Cable Telecommunications Association in response to the Pre-Hearing Brief of Chattanooga Electric Power Board for filing in the above referenced matter. Copies are being served on parties of record.

If you have any questions or concerns regarding this matter, please do not hesitate to contact me.

Very truly yours,

By: 
Charles B. Welch, Jr.

CBWjr:cg
cc: Parties of Record
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EXECUTIVE SECRETARY
OFFICE OF THE

BEFORE THE TENNESSEE REGULATORY AUTHORITY

IN RE:

**APPLICATION OF ELECTRIC)
POWER BOARD OF CHATTANOOGA)
FOR A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY)
TO PROVIDE INTRASTATE)
TELECOMMUNICATIONS SERVICES)**

**DOCKET NO.
97-07488**

***REPLY BRIEF OF TENNESSEE CABLE TELECOMMUNICATIONS
ASSOCIATION IN RESPONSE TO THE PRE-HEARING BRIEF
OF CHATTANOOGA ELECTRIC POWER BOARD***

The Tennessee Cable Telecommunications Association ("TCTA"), through counsel, submits this reply brief in response to the pre-hearing brief submitted by the Chattanooga Electric Power Board, pursuant to the procedural schedule adopted by the Tennessee Regulatory Authority ("TRA") as follows:

I. BACKGROUND

Government entry into competitive markets traditionally served by the private sector has been the subject of considerable debate. The TCTA is and has always been an advocate of the position that competition is the best regulator of the quality and price of services. In its 1997 session, the Tennessee General Assembly determined that local governments should be permitted to compete in the local exchange telecommunications markets. Conscious of the enormous competitive advantage of municipal governments, the state legislature imposed certain important restrictions on the local government's telecommunications operations. The state legislature

delegated supervisory authority to the TRA in order to ensure that governmental entities do not employ anti-competitive practices to the detriment of competition in a marketplace which is in its infant stages of development.

In considering the Chattanooga Electric Power Board's ("EPB") application for a certificate of authority to operate as a competing telecommunications service provider in this proceeding, the TRA should impose special conditions or adopting special rules applicable to municipalities. These competitive safeguards should be adopted in the context of the special environment in which local governments operate. Local governments own the poles and rights-of-ways necessary to the business operations of competing carriers; are not subject to state, local or federal tax; and act as the franchising authority which consider competing carrier's applications to operate in municipal service areas. In many instances, municipalities have required the donation of fiber optic network as a condition to granting franchises and entering into pole attachment agreements with telecommunications service providers.

In its amendments to Chapter 5, Title 7 of the Tennessee Code Annotated granting authority to municipal governments to provide telecommunications services, the legislature addressed these critical issues by imposing certain requirements which are not applicable to private sector providers. It is incumbent upon the TRA to create a regulatory framework to enforce those requirements. The threat of inadequate supervision of the government's operations represents a serious risk to the development of competition in the marketplace and the benefits to be derived by Tennessee consumers. In its pre-hearing brief, the EPB suggests that the TRA has no authority to adopt or impose new or additional regulations to implement the legislative mandate. Obviously, this concept is contrary to the intent of the legislature and the fundamental principles of the regulatory process.

The TRA has been granted broad general, supervisory and regulatory power, jurisdiction and control over all public utilities and their property, property rights, facilities, and franchises. TCA §65-4-104.

II. ARGUMENT

A. *The Electric Power Board of Chattanooga is Subject to all Rules and Orders of the Tennessee Regulatory Authority*

The EPB maintains it is not subject to the provisions of TCA §65-5-208(c) concerning cross-subsidization because it is not an incumbent local exchange telephone company as defined by state law. This section authorizes the TRA to adopt rules to prohibit cross-subsidization and "other anti-competitive practices". Although it may not be perfectly clear whether this provision is limited to incumbent local exchange companies within this section, a reading of TCA §7-52-401 resolves any doubt as to the applicability of the provision to municipalities providing telecommunications services. This section reads in pertinent part as follows:

"...to the extent that any municipality provides any of the services authorized by this section shall be subject to regulation by the Tennessee Regulatory Authority in the same manner and to the same extent as other certificated providers of the telecommunications services, including without limitation rules or orders governing anti-competitive practices,..."

Clearly, cross-subsidization is an anti-competitive practice which is subject to TRA regulation.

The issue of cross-subsidization becomes most important in the monopoly environment. Undisputedly, the EPB is a monopoly provider of electric services within its service area. Competition is seriously threatened, if monopoly providers are permitted to bundle services and subsidize competitive services with monopoly service revenues. This issue is also addressed in TCA §7-52-402 which reads, in part, as follows:

“A municipality providing any of the services authorized by Section 7-52-401 shall not provide subsidies for such services.”

After this express prohibition, this section specifically enumerates the limited authority of the municipality to support telecommunications services. The municipality may only dedicate a reasonable portion of its electric plant to the provision of telecommunications services and may only lend funds at specified rates of interest after approval of the state director of local finance.

The EPB’s argument that the rules prohibiting anti-competitive practices does not apply to their operations suggests that they intend to rely upon unlawful tactics to compete in the market. Many of these type practices are strictly prohibited by state and federal anti-trust laws and, in many instances, such practices constitute criminal violations. The EPB’s contention that it’s ability to cross-subsidize will benefit competition and is consistent with the spirit of the 1995 State Telecommunication Act is totally without merit and contrary to basic economic principles.

In the alternative, the EPB submits that “in the event that the Tennessee Regulatory Authority determines that one or more rules or orders relating to cross-subsidization do apply to the Electric Power Board, then the demonstration of compliance required under the authority of the Tennessee Code Annotated §65-4-201(c) must be the same as required for other applicants...”. This contention assumes that all telecommunications service providers must be treated identically. Although all providers should be treated fairly, competition will not develop, if all providers are subject to the exact same rules. Since different providers possess varying levels of market power (e.g., incumbent providers and municipalities), different rules are appropriate and necessary. As the EPB points out in this brief, incumbent local exchange carriers are subject to certain rules which do not apply to competing providers. The TRA has become very familiar with this concept in its administration of

the state and federal telecommunications acts.

- B. *The Electric Power Board of Chattanooga should be required to demonstrate its ability, intent, and plan to comply with all state law and Tennessee Regulatory Authority rules and orders*

The EPB contends that all necessary regulation of its telecommunications business operations is governed by state statutory provisions and the TRA should do nothing more to supervise or regulate the enforcement of those provisions. This position simply ignores the agency's regulatory authority and the purpose for which that authority was created. It is very illogical to assume that the legislature would grant jurisdiction to the TRA to regulate municipal telecommunications services without the authority to adopt rules to require reporting, conduct investigations, and issue orders effecting those telecommunications operations.

The EPB maintains that other applicants have been granted certificates of authority without demonstration of compliance with certain statutory requirements. This assertion is erroneous. Other applicants have been required to demonstrate compliance with statutory requirements applicable to them by way of testimony and documentary evidence. These other applicants, however, were not governmental entities, monopoly providers, taxing authorities or the owners of public right-of-ways. By enacting separate legislation allowing municipalities to compete, the legislature acknowledged the differences between providers and mandated different regulation for municipalities providing telecommunications services so as to prevent unfair practices which ultimately could eliminate all competition.

- C. *The Tennessee Regulatory Authority should initiate a rulemaking procedure or, and in the alternative, impose conditions on the approval of the Electric Power Board of Chattanooga's certification to ensure compliance with TCA §7-52-401 et seq*

EPB is the first governmental entity to make application for authority to provide telecommunications services in markets which have historically been served by the private sector. State agencies have regulated telephone companies pursuant to state law for nearly a century. These agencies have never been presented with the issues which are currently before the TRA in this proceeding. To further complicate this proceeding, the applicant is subject to certain state law requirements which are not applicable to other telecommunications service providers. There is no established process or rules to regulate this new type of telephone company.

In order to enforce the prohibition against cross-subsidization, ensure appropriate tax equivalent payments and allocation of costs for pole attachments and rights-of-way fees as required by the Municipal Electric Act of 1997, it will be necessary for the TRA to design a new process applicable to the municipal electric telecommunication providers. The TCTA submits that this would be most efficiently accomplished in a separate rule making proceeding. Upon their adoption, these rules would be applicable to all municipalities, assuming there will be applications filed on behalf of other such entities. The rulemaking procedure would ensure the equal treatment of all municipal applicants and would offer an opportunity for those parties to participate and be heard on the issues.

If the TRA does not choose to open a rulemaking proceeding, the appropriate alternative is to make the EPB's certificate of authorization subject to conditions necessary to ensure compliance with the statutory provisions. These conditions should include, without limitation, certain reporting and filing requirements, a calculation for allocation of cost and tax equivalent payments, an identification of a reasonable portion of the electric power plant to be dedicated to provisioning of telecommunications services, and specific rules to prevent subsidization of competitive services with

monopoly service revenues, as required by the statute.

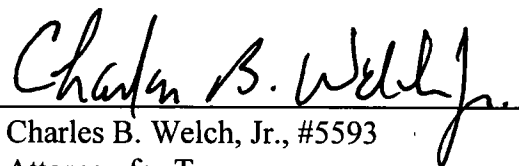
III. CONCLUSION

The TCTA submits that the issues to this proceeding are critical to the development of competition in the Tennessee telecommunications service markets and urges the TRA to initiate a rulemaking proceeding for the purpose of ensuring compliance with TCA §7-52-401 et seq. before granting the Electric Power Board's application.

Respectfully submitted,

FARRIS, MATHEWS,
BRANAN & HELLEN, P.L.C.

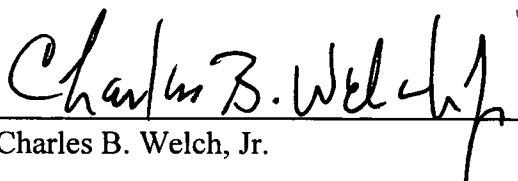
By:



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CERTIFICATE OF SERVICE

I, Charles B. Welch, Jr., hereby certify that I have served a copy of the foregoing Reply Brief of the Tennessee Cable Telecommunications Association in response to the Pre-hearing of the Chattanooga Electric Power Board on the parties on the attached list, by depositing copy of same in the U.S. Mail, postage prepaid this the 1st day of April 1998.


Charles B. Welch, Jr.

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